

**JUSTICE OF THE PEACE COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY  
COURT NO. 13**

GALMAN WHITNEY LLC  
Plaintiff Below,

VS

ZAKIYYAH A DAVIS  
Defendant Below,

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C.A. No. JP13-18-008114

TRIAL DE NOVO

Submitted: November 9, 2018

Decided: November 26, 2018

**APPEARANCES:**

Galman Whitney LLC, Plaintiff appeared by and through David C. Zerbato, Esq.  
Zakiyyah A. Davis, Defendant appeared pro se

Sean P. McCormick, Deputy Chief Magistrate  
Robert C. Lopez, Justice of the Peace  
Peter Burcat, Justice of the Peace

**JUSTICE OF THE PEACE COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY  
COURT NO. 13**

**CIVIL ACTION NO: JP13-18-008114**

**GALMAN WHITNEY LLC VS ZAKIYYAH A DAVIS**

**ORDER ON TRIAL DE NOVO**

On July 16, 2018, Plaintiff GALMAN WHITNEY LLC, through their *Form 50* agent, Angela Lee Wolfgang, filed the present Landlord-Tenant Complaint against Defendant ZAKIYYAH A DAVIS, seeking a monetary recovery and possession of a rental property allegedly occupied by Defendant. Plaintiff alleged Defendant was delinquent with her contracted lease payments and had not responded to a Five (5) Day Notice sent to Defendant. On July 31, 2018, this matter was set for trial in JP Court 13 for August 23, 2018 at 1:00 p.m. All Parties were notified by the Court of the trial date. On August 23, 2018, Plaintiff appeared by and through Ms. Wolfgang. Defendant DAVIS appeared *Pro Se*. Ms. Davis advised the Court that she wanted a continuance so she could file a Counterclaim. The Court granted the continuance request and Ms. Davis was advised she would have to file her Counterclaim by August 31, 2018. Ms. Davis was further advised that failure to timely file the Counterclaim would result in the Counterclaim being barred. On August 30, 2018, this matter was re-set for trial in JP Court 13 for September 24, 2018 at 8:30 a.m. On August 31, 2018, Ms. Davis filed her Counterclaim. On September 19, 2018, counsel David C. Zerbato entered his appearance on behalf of Plaintiff. On September 24, 2018, Plaintiff appeared through and by their counsel, Mr. Zerbato. Defendant again appeared *Pro Se*. A full trial ensued. On October 3, 2018, a Judgment was entered awarding a monetary recovery and possession to Plaintiff. On October 8, 2018 Defendant DAVIS filed an Appeal for a *Trial de Novo*. The Appeal request was granted and Defendant was ordered to post a \$5,300.00 bond to stay the Writ of Possession. On October 18, 2018, this matter was set for a *Trial de Novo* hearing in JP Court 13 for November 9, 2018 at 9:00 a.m. Ms. Davis did not post the \$5,300.00 bond. On October 19, 2018, Plaintiff filed a Request for a Writ of Possession. On October 23, 2018, a Writ of Possession was issued. The Writ was served on October 25, 2018. Defendant DAVIS vacated the rental property on October 26, 2018.

On November 9, 2018, Plaintiff appeared for the *Trial de Novo* through and by their counsel, Mr. Zerbato. Defendant appeared *Pro Se*. The *Trial de Novo* was heard before a three judge panel.

Both Parties made an opening statement. As possession was no longer at issue, Mr. Zerbato stated the only issue to be decided by the Court was Defendant's Counterclaim which sought an abatement of her rental obligation. Mr. Zerbato stated if Defendant had an issue regarding the condition of her rental property, she could have sought to terminate the lease. He further stated his client, the landlord herein, tried to remedy any issues raised by Defendant. Ms. Davis stated she withheld the monthly rental obligations because of a roach infestation in the rental property. She further stated she had spoken with an agent for the landlord who told her she could withhold rent.

Mr. Zerbato called his first witness, Samantha Kane. Ms. Kane testified she was the assistant property manager for the rental property occupied by Defendant. Mr. Zerbato had a document labeled as Plaintiff's "Exhibit P-1." Ms. Kane identified P-1 as the lease agreement between Plaintiff and Defendant herein. Mr. Zerbato moved P-1 into evidence without objection from Ms. Davis. Ms. Kane testified Ms. Davis became delinquent in her rental obligations as set forth in the Lease. Mr. Zerbato had a document labeled as Plaintiff's "Exhibit P-2." Ms. Kane identified P-2 as the Five (5) Day Notice sent to Defendant herein. Mr. Zerbato moved P-2 into evidence without objection from Ms. Davis. Ms. Kane stated no

payment was received from Defendant DAVIS subsequent to the mailing of the Five (5) Day Notice. Ms. Kane testified she spoke with Ms. Davis and Ms. Davis informed her that she would not be making any further rent payments due to a roach infestation issue with the rental property. Ms. Kane further testified that in fact, no further rental payments were received from Ms. Davis. Mr. Zerbato had a document labeled as Plaintiff's "Exhibit P-3." Ms. Kane identified P-3 as the "rental history" of Defendant DAVIS. The rental history was the account ledger for Ms. Davis and the rental property. Mr. Zerbato moved P-3 into evidence without objection from Ms. Davis. Ms. Kane said the account ledger was through October 26, 2018, the day Ms. Davis vacated the rental property. Mr. Zerbato concluded his questioning of Ms. Kane.

Ms. Kane was cross-examined by Defendant DAVIS. On cross-examination, Ms. Kane confirmed Ms. Davis was upset about a claimed roach issue with the rental property. Ms. Kane confirmed she told Ms. Davis that she could withhold rent because of the roach issue, and further stated the roach issue may be coming from an adjoining rental apartment. Ms. Davis had six (6) photographs labeled as Defendant's "Exhibit D-1." The photographs were taken by Ms. Davis and identified as being taken at the time Ms. Davis moved out of the rental property. Ms. Davis moved D-1 into evidence without objection from Mr. Zerbato. Ms. Davis had 14 photographs labeled as Defendant's "Exhibit D-2." The photographs were taken by Ms. Davis and identified as being taken for the purposes of showing roaches in her rental property and a hole in a bathroom ceiling. Ms. Davis moved D-2 into evidence without objection from Mr. Zerbato. Ms. Davis had a thumb drive labeled as Defendant's "Exhibit D-3." The thumb drive was a video taken by Ms. Davis for the purpose of showing roaches in her rental property. Ms. Davis moved D-3 into evidence without objection from Mr. Zerbato. The video was displayed on a screen in the courtroom. Ms. Kane testified she was told by Ms. Davis that Ms. Davis' son had a medical condition. Ms. Davis concluded her cross-examination of Ms. Kane.

Mr. Zerbato had some re-direct questions for Ms. Kane. Ms. Kane testified that Plaintiff had a service contract with a pest extermination company. The extermination company would treat the apartment complex every Wednesday and Thursday on a regular service schedule, and when needed. However, Ms. Kane did not know what specific dates the extermination company actually treated Defendant's apartment. However, she stated she did know Ms. Davis' apartment was in fact treated "a number of times." Ms. Davis asked Ms. Kane, if requested, would a tenant's apartment be treated on a weekly basis. Ms. Kane responded that weekly treatments could be done if so requested. Plaintiff rested.

Defendant did not make any motions. Defendant called her first witness, which was herself. Ms. Davis testified she moved into the rental property on April 26, 2018. She stated during move-in, she noticed a dead roach in the hallway outside of her apartment. She further testified that after only two (2) days being in the rental property she noticed roaches on a regular basis. She stated the condition became unbearable and she made numerous attempts to notify the landlord, but she would not receive a response from the landlord. She testified she spoke with Ms. Kane and requested that she be moved to another apartment in the building. If that was not possible, Ms. Davis stated she asked Ms. Kane for a rent reduction so she could save money to move. Ms. Davis testified her son had allergies and asthma. She stated she suffered embarrassment for herself and her son because there were occasions when at work, she would open a bag she had brought from her apartment, and a roach would scurry out of the bag. She stated the same thing occurred with her son at his school. Ms. Davis confirmed the landlord had sent an exterminator to her rental property, but the problem with the roaches persisted. Ms. Davis stated the situation became unbearable so she had to move out of the rental property. Ms. Davis testified she moved out sometime before October 26, 2018, but agreed not all of her belongings had been removed before October 26, 2018. Ms. Davis then testified about the landlord not following "protocol." She stated there was an occasion when she found a maintenance man in her apartment and he had entered unannounced. Ms. Davis stated she was not dressed at that time and she called the police. Ms. Davis testified she felt

she had no choice but to move from the rental property. Ms. Davis concluded by stating she herself was a landlord and believed Plaintiff was not properly managing their rental property.

Mr. Zerbato asked Ms. Davis some questions on cross-examination. Ms. Davis testified that in July 2018, she requested the lease be terminated if Plaintiff would not provide her with a rent reduction. She stated her request for a rent reduction was denied. Ms. Davis testified she told Ms. Kane about her concerns, but felt the landlord was not doing anything to resolve the problem. Ms. Davis stated Ms. Kane apologized and confirmed that the landlord would not be lowering the rent. On inquiry, Ms. Davis confirmed she did not send Plaintiff anything in writing, but rather all of her complaints were made verbally. Ms. Davis stated in retrospect, she realized she should have put everything in writing. However, she stated she did put her request for lower rent in writing. Ms. Davis had a document labeled as Defendant's "Exhibit D-4." Ms. Davis testified D-4 was an email she sent on July 16, 2018 to Plaintiff requesting a rent reduction. Ms. Davis moved D-4 into evidence without objection from Mr. Zerbato. Ms. Davis testified there was a water leak issue in the apartment and this was at the same time the maintenance man was found unannounced in her apartment. She stated the water leak issue occurred after the original trial date in September 2018. Ms. Davis confirmed she moved out of the rental property sometime in mid-October, but did not return the keys to the rental property until October 26, 2018. Ms. Davis rested.

For rebuttal, Mr. Zerbato re-called witness Samantha Kane. Ms. Kane again testified that she spoke with Ms. Davis about Ms. Davis' request for rent reduction. Ms. Kane stated she advised Ms. Davis that Ms. Kane could not make that decision as she did not have the authority to adjust the rent. On cross-examination, Ms. Kane stated she would get back to Ms. Davis with an answer to the request for a rent reduction, but in fact, did not get back to Ms. Davis with an answer.

Mr. Zerbato then called his next rebuttal witness, William Dellaratta. Mr. Delaratta testified he was the branch manager for *Western Pest Control*, who serviced the rental building at issue in this matter. He stated that his company had a policy of responding to a customer within 24 hours if there was a service request. Mr. Zerbato had a document labeled as Plaintiff's "Exhibit P-4." Mr. Delaratta identified P-4 as a service record dated April 25, 2018 for the rental building. Mr. Zerbato moved P-4 into evidence without objection from Ms. Davis. Mr. Delaratta stated the service that was being performed was a typical chemical treatment for "general pests. Mr. Zerbato had a document labeled as Plaintiff's "Exhibit P-5." Mr. Delaratta identified P-5 as a service record dated June 13, 2018 for the rental building. Mr. Zerbato moved P-5 into evidence without objection from Ms. Davis. Mr. Zerbato had a document labeled as Plaintiff's "Exhibit P-6." Mr. Delaratta identified P-6 as a service record dated July 18, 2018 for the rental building. Mr. Zerbato moved P-6 into evidence without objection from Ms. Davis. Mr. Zerbato had a document labeled as Plaintiff's "Exhibit P-7." Mr. Delaratta identified P-7 as a service record dated July 25, 2018 for the rental building. Mr. Zerbato moved P-7 into evidence without objection from Ms. Davis. Mr. Zerbato had a document labeled as Plaintiff's "Exhibit P-8." Mr. Delaratta identified P-8 as a service record dated September 12, 2018 for the rental building. Mr. Zerbato moved P-8 into evidence without objection from Ms. Davis. Mr. Delaratta testified his company did everything it could to treat for roaches at the apartment complex. He stated part of the treatment included spraying a chemical that would not necessarily immediately kill the roaches, but rather would enable the roaches to take the chemical back to their nests and over a short period of time, would kill the roaches and their offspring. On cross-examination, Mr. Delaratta confirmed there was an on-going issue with roaches at the complex, but his company continued to treat the complex. He further agreed that roaches do migrate.

Mr. Zerbato called his third rebuttal witness, Angela Wolfgang. Ms. Wolfgang testified she was the property manager for the apartment complex at issue in this matter. Ms. Wolfgang stated she knew Defendant DAVIS, but she did not have any direct communication with Ms. Davis. Ms. Wolfgang

testified that if the landlord received a complaint from a tenant, a work order would be generated. Mr. Zerbato had a document labeled as Plaintiff's "Exhibit P-9." Ms. Wolfgang identified P-9 as the work order history for Ms. Davis and her rental unit. Mr. Zerbato moved P-9 into evidence without objection from Ms. Davis. Ms. Wolfgang stated a work order was generated on May 18, 2018 subsequent to receiving a complaint from Ms. Davis regarding roaches in the rental property. Ms. Wolfgang testified maintenance personnel did an inspection and treated Ms. Davis' apartment with Boric acid. Ms. Wolfgang further testified that there were 511 apartments in the complex where Ms. Davis resided. She stated pest treatments are done on a rotating basis and approximately 40 rental units are treated each week. Mr. Zerbato had a document labeled as Plaintiff's "Exhibit P-10." Ms. Wolfgang identified P-10 as a letter dated July 23, 2018 written by herself in response to Ms. Davis' July 16, 2018 email. Mr. Zerbato moved P-10 into evidence without objection from Ms. Davis. Ms. Wolfgang stated in the letter she apologized for Ms. Davis' dissatisfaction with the pest control that had been done, and confirmed additional pest control treatments would be done in addition to the standard routine scheduled treatments. In addition, she stated the letter included a statement that the request for rent reduction was denied. Ms. Wolfgang testified that at no time did Ms. Davis request the lease be terminated. On cross-examination, Ms. Davis asked questions regarding the leak in the apartment in October, the maintenance man being in her apartment unannounced, and the issues and resultant damage caused by the leak. Ms. Wolfgang provided responses to questions regarding the leak, but as this issue arose after the underlying trial in this matter, it is not necessary to expand in detail herein on the leak issue. Ms. Wolfgang did state there was the possibility of a rent reduction in the right circumstance, but that was not a decision she could make. All she could do would be to pass such a request on to her superiors. At this point, testimony was concluded.

Mr. Zerbato made a closing argument. Mr. Zerbato argued the entire rent issued rested on only one (1) issue, the claimed roach infestation. As correctly noted, the issue with the leak was not ripe before the *de novo* panel as the leak issue was not raised at the original trial. Mr. Zerbato stated the tenant's only remedy for an issue such as a roach infestation would be to terminate the lease, unless the problem was purposely caused by the landlord or was caused by the negligence of the landlord. He further argued Plaintiff herein properly and fully responded to Defendant's complaints, but none of the said complaints were put in writing as required by the *Landlord-Tenant Code*. Mr. Zerbato admitted Defendant's photographs and video showed both dead and live roaches, but he reminded the Court that treatment for roaches would not immediately kill the roaches, and in fact, it may take a couple of weeks for the treatment to be fully effective. Mr. Zerbato concluded by asking the *de novo* panel to let stand the order from the trial.

Ms. Davis made a closing argument. Ms. Davis argued that the roaches depicted as dead were killed by the treatments she did herself. She stated the problem with the roaches started from the day she moved into the rental property at issue and continued until she moved out. She admitted she did not do everything right, as per the *Landlord-Tenant Code*, but she was not an attorney. She stated Plaintiff continued to treat her apartment with Boric acid even after she told Plaintiff about her son's allergies and asthma. She repeated her earlier comment regarding her embarrassment at work when a roach would crawl out of her bag, and her son's bag at school. She argued the service reports produced by *Western* were falsified. She stated she tried to get Plaintiff to respond to her complaints but Plaintiff would not return her telephone calls. She concluded by stating she cared about her credit. She stated the situation was out of her control and the situation was bigger than just rent.

### Findings

A plaintiff has the burden of proving their case by a preponderance of the evidence. "Preponderance of the Evidence is a standard of proof that is met when a party's evidence indicates that the fact 'is more

likely than not' what the party alleges it to be. Evidence which, as a whole, shows the fact to be proved is more probable than not. *9 Del. Admin. Code 303-5.0.*

Plaintiff herein, GALMAN WHITNEY LLC, introduced into evidence, without objection, as P-1, a Lease Agreement signed on behalf of Plaintiff and signed by Defendant. Therefore, there is no dispute that the Parties agreed to, and entered into, the said Lease Agreement commencing May 1, 2018 and continuing through April 30, 2019. The *Landlord-Tenant Code* regulates and sets forth the legal rights, remedies and obligations of all of the parties to a residential rental agreement within the State of Delaware. See *25 Del.C. §5101, et seq.* The case at bar is a residential Landlord-Tenant action. As per the Lease Agreement, Defendant ZAKIYYAH A DAVIS agreed to pay Plaintiff a monthly rental payment of \$1,525.00. A Landlord's remedies for a Tenant's failure to pay rent are set forth in *25 Del.C. §5502(a)*, which states in pertinent part:

*A landlord or the landlord's agent may, any time after rent is due, including the time period between the date the rent is due and the date under this Code when late fees may be imposed, demand payment thereof and notify the tenant in writing that unless payment is made within a time mentioned in such notice, to be not less than 5 days after the date notice was given or sent, the rental agreement shall be terminated. If the tenant remains in default, the landlord may thereafter bring an action for summary possession of the dwelling unit or any other proper proceeding, action or suit for possession.*

A landlord may bring an action against a tenant for Summary Possession of the demised premises if the Tenant "has wrongfully failed to pay the agreed rent." *25 Del.C. §5702(2)*. Pursuant to the aforementioned Code Sections, at trial, the landlord (Plaintiff herein) must introduce into evidence a copy of the requisite Five (5) Day Notice given or sent to the tenant (Defendant herein). A landlord cannot proceed with a summary possession action without first providing the tenant with the requisite Five (5) Day Notice. In the case at bar, Plaintiff introduced into evidence P-2, without objection, a copy of the Five (5) Day Notice sent to Defendant. No payment was made by Defendant subsequent to the sending of the Five (5) Day Notice.

Defendant did not specifically identify which section(s) of the Delaware *Landlord-Tenant Code* she was relying on for her position that she was not obligated to pay her rent because of an issue with roaches in her rental unit. Defendant argued that her rent should have been abated due to an alleged roach infestation of the rental unit. Mr. Zerbato argued Defendant's potential reliance on *25 Del.C. §5306* would not be applicable in the present case. As per *25 Del.C. §5306, Tenant's remedies relating to the rental unit; termination*:

*(a) If there exists any condition which deprives the tenant of a substantial part of the benefit or enjoyment of the tenant's bargain, **the tenant may notify the landlord in writing** of the condition and, if the landlord does not remedy the condition within 15 days following receipt of notice, the tenant may terminate the rental agreement. **If such condition renders the premises uninhabitable or poses an imminent threat to the health, safety or welfare of the tenant or any member of the family, then tenant may, after giving notice to the landlord, immediately terminate the rental agreement without proceeding in a Justice of the Peace Court.***

*(b) The tenant may not terminate the rental agreement for a condition caused by the want of due care by the tenant, a member of the family or any other person on the premises with the tenant's consent. If a tenant terminates wrongfully, the tenant shall remain obligated under the rental agreement.*

*(c) If the condition referred to in subsection (a) of this section **was caused wilfully or negligently by the landlord**, the tenant may recover the greater of:*

(1) *The difference between rent payable under the rental agreement and all expenses necessary to obtain equivalent substitute housing for the remainder of the rental term; or*

(2) *An amount equal to 1 month's rent and the security deposit.*

(emphasis added)

Defendant argued that she should not have been required to pay rent because she was deprived of a substantial part of the benefit or enjoyment of the tenant's bargain. But, for the tenant to make such a claim, she would be required, as per the cited *Code* Section, to "notify the landlord in writing of the condition." In the present case, the only writing Defendant DAVIS admits to sending Plaintiff was the email she sent on July 16, 2018. However, Defendant stated the email was not requesting the lease be terminated, but rather, sought a rent reduction. Unfortunately, a rent reduction is not an allowable remedy for a tenant in the circumstances raised by Defendant herein. There was no evidence presented by Defendant that she sought to terminate the lease because of the alleged roach infestation. The Court does believe there was an issue with roaches in the apartment building. While it would be an unwanted living condition, Plaintiff did present evidence that the pest condition was being reasonably, and timely, addressed. There was no evidence presented by Defendant that Plaintiff willfully or negligently caused the roach issue.

Under certain circumstances, a tenant may be able to deduct from rent certain repairs that are needed for a rental property. *25 Del.C. §5307 Tenant's remedies relating to the rental unit; repair and deduction from rent* states in pertinent part:

*(a) If the landlord of a rental unit fails to repair, maintain or keep in a sanitary condition the leased premises or perform in any other manner required by statute, code or ordinance, or as agreed to in the a rental agreement; and, if after being notified in writing by the tenant to do so, the landlord:*

*(1) Fails to remedy such failure within 30 days from the receipt of the notice; or*

*(2) Fails to initiate reasonable corrective measures where appropriate, including, but not limited to, the obtaining of an estimate of the prospective costs of the correction, within 10 days from the receipt of the notice;*

*Then the tenant may immediately do or have done the necessary work in a professional manner. After the work is done, the tenant may deduct from the rent a reasonable sum, not exceeding \$200, or 1/2 of 1 month's rent, whichever is less, for the expenditures by submitting to the landlord copies of those receipts covering at least the sum deducted.*

*(b) In no event may a tenant repair or cause anything to be repaired at the landlord's expense when the condition complained of was caused by the want of due care by the tenant, a member of the tenant's family or another person on the premises with the tenant's consent.*

*(c) A tenant who is otherwise delinquent in the payment of rent may not take advantage of the remedies provided in this section.*

(emphasis added).

As noted in this section, if there were to be an abatement, the maximum amount that could be deducted from the monthly rental obligation, if the tenant was not already delinquent in the payment of rent, would be \$200.00. Defendant herein improperly withheld the entire monthly rental payment of \$1,525.00. However, this section of the *Landlord-Tenant Code* would not be applicable in this matter as Defendant did not produce any evidence that she had to hire her own exterminating company to treat the roach complaint.

Under certain circumstances, a tenant may be able to withhold two-thirds per diem rent when a substantial service, identified as hot water, heat, or water is not supplied to the rental property. Or, if the landlord fails to remedy a condition that materially deprives a tenant of a substantial part of the benefit of the tenant's bargain, and fails to provide the tenant substitute housing if needed. 25 Del.C. §5308 *Essential services; landlord obligation and tenant remedies* states in pertinent part:

*(a) If the landlord substantially fails to provide hot water, heat, water or electricity to a tenant, or fails to remedy any condition which materially deprives a tenant of a substantial part of the benefit of the tenant's bargain in violation of the rental agreement; or in violation of a provision of this Code; or in violation of an applicable housing code and such failure continues for 48 hours or more, after the tenant gives the landlord actual or written notice of the failure, the tenant may:*

*(1) Upon written notice of the continuation of the problem to the landlord, immediately terminate the rental agreement; or*

*(2) Upon written notice to the landlord, keep 2/3 per diem rent accruing during any period when hot water, heat, water, electricity or equivalent substitute housing is not supplied. The landlord may avoid this liability by a showing of impossibility of performance.*

(emphasis added).

The key word in an analysis of this particular Code Section, is "substantial." As stated above, Defendant stated the only written document she provided to Plaintiff was the July 16, 2018 email requesting rent reduction. The email did not request a termination of the lease and it did not seek a daily abatement of 2/3 of the rent. Defendant did not advise Plaintiff that she was being deprived of a "substantial part of the benefit of" her bargain with the landlord. To the contrary, she was willing to continue living in the rental property, even if there were roaches, if the landlord would be willing to reduce the rent by a few hundred dollars. If the problem was in fact substantial, it would be reasonable to believe there was no way Defendant and her son would have continued to reside in the rental unit.

#### Order

Based upon the foregoing, JUDGMENT for Plaintiff as follows:

Rent: \$ 6,103.06 Through and including October 26, 2018

Judgment Total: \$ 6,103.06

Court costs: \$ 43.75

Post-Judgment Interest: 7.75%

As for Defendant's Counterclaim, JUDGMENT for Plaintiff.

IT IS SO ORDERED 26th day of November, 2018

/s/ Sean P. McCormick (SEAL)

SEAN P. MCCORMICK

Deputy Chief Magistrate

On behalf of the 3-Judge Panel